Supreme Court, U.S.
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No.

In the Supreme Court of the United States

ESTELA ORTIZ-NAVA,

Petitioner,

v.

ALBERTO R. GONZALES, Attorney General,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether an Immigration Judge's purported misapplication of law to the undisputed facts of a discretionary decision can create a colorable claim to due process ultimately creating a inherent statutory conflict in terms of jurisdiction?

   A. Whether the Immigration Judge's decision in the present case exemplified this purported conflict

2. Whether the Board of Immigration Appeals streamlining procedure is in offense of an alien immigrant's right to due process under the Fifth Amendment to the Constitution of the United States?

3. Whether the Board of Immigration Appeals streamlining procedure's application to Petitioner, as affirmed by the United States Court of Appeals for the Ninth Circuit in accordance with Falcon Carriche v. Ashcroft, 350 F.3d 845 (9th Cir. 2003), violated Petitioner's right to due process under the Fifth Amendment of the Constitution of the United States.

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Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

Estela Ortiz-Nava ("Petitioner") respectfully petitions for a writ of certiorari to review the judgement of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The United States Court of Appeals for the Ninth Circuit dismissed the preceding petition for direct review in part and denied such for lack of jurisdiction in part on July 31, 2006. (Appendix[1] "A", *infra*, 1a-3a.) On March 25, 2005, the Board of Immigration Appeals ("BIA") in the United States Department of Justice's Executive Office of Immigration Review (App. "B", *infra*, 4a-5a), affirmed the opinion the decision of the Immigration Judge (App. "C", *infra*, 6a-20a) originally entered on February 11, 2004.

JURISDICTION

As stated above, the court of appeals entered its final judgment for docket number 05-72303 on July 31, 2006 (App. "A", *infra*, 1a-3a) in an unreported decision and order. The preceding petition for review invoked the jurisdiction of the court of appeals under 8 U.S.C. § 1252, as amended by the REAL ID Act of 2005, § 106(a), Pub. L. No. 109-13, Div. B, 119 Stat. 231 (May 11, 2005). The instant petition for writ of certiorari invokes the jurisdiction of this Court under 28 U.S.C. § 1254(1).

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[1] "Appendix" will hereinafter be referred to as "App.".

STATUTORY PROVISION INVOLVED

INA § 240A(b), 8 U.S.C. § 1229b(b) reads, in pertinent part:

> The Attorney General may cancel removal of, and adjust to the status of an alien lawfully admitted for permanent residence, an alien an alien who is inadmissible or deportable from the United States if the alien–...
>
> (A) has been physically present in the United States for a continuous period of not less than 10 years immediately preceding the date of such application;
>
> (B) has been a person of good moral character during such period;
>
> (C) has not been convicted of an offense under section 212(a)(2), 237(a)(2) or 237(a)(3) [8 USCS § 1182(a)(2), 1227(a)(2), or 1227(a)(3)], subject to paragraph (5); and
>
> (D) establishes that removal would result in exceptional and extremely unusual hardship to the alien's spouse, parent, or child, who is a citizen of the United States or an alien lawfully admitted for permanent residence.

Moreover, 8 U.S.C. § 1252(a)(2)(B)[2], subtitled "[d]enials of discretionary relief", reads "no court shall have jurisdiction to review...any judgment regarding the granting of relief

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[2] This subsection pertains specifically to the federal court's jurisdiction to review decisions originating with the Immigration Court under 8 U.S.C. § 1229b(b).

under section 212(h), 212(i), 240A, 240B, or 245 [8 USCS §§ 1182(h), 1182(i), 1229b, 1229c, or 1255." Despite this seemingly limitless jurisdictional bar for specific discretionary decisions, 8 U.S.C. § 1252(a)(2)(D) reads:

> Nothing in subparagraph (B) or (C), or in any other provision of this Act (other than this section) which limits or eliminates judicial review, shall be construed as precluding review of constitutional claims or questions of law raised upon a petition for review filed with an appropriate court of appeals in accordance with this section.

In addition, Section 101(a)(47) of the Immigration and Nationality Act ("INA"), 8 U.S.C. § 1101(a)(47) established *both* that persons in removal proceedings have a right to an administrative appeal and also that the Board of Immigration Appeals is the final adjudicator in the administrative appeals process.

STATEMENT OF THE CASE

The application of the sections for relief from removal proceedings contained in the Immigration and Nationality Act ("INA"), and the appellate review of such relief applications, affects thousands of immigrants each year in their quest to remain lawfully in the United States. The recently-passed REAL ID Act of 2005 vests exclusive jurisdiction with the federal circuit courts over constitutional questions of due process arising from INA's application to an alien applying for relief. As a result of the federal circuits below, whom apparently vary on whether issues of application of law to fact can or cannot raise a colorable due process claim, there is an

inherent conflict in the interpretation and application of the jurisdictional portions of the INA.

A. PETITIONER'S IMMIGRATION AND FAMILY STATUS

Petitioner is a 39-year-old native and citizen of Mexico who first entered this country on or about November of 1987. Petitioner has three sons, ages 16, 14, and 10, who are all United States citizens. She provides a majority of the financial support for the family as her husband additionally is an illegal alien who has been deported to Mexico. Her children all are excelling in school and are immersed within the only cultural backdrop they have ever know which is that of the American lifestyle and school system. None of the children are able to write in the Spanish language. Petitioner has maintained a stellar and consistent work record in the United States since entering this country, and suffered no criminal convictions or immigration violations other than those contained in the NTA. In addition, Petitioner has significant property ties within the United States as evidenced by the large amount of equity within the family abode.

B. PROCEEDINGS BELOW

After voluntarily surrendering herself to the Government, Petitioner was issued a notice to appear ("NTA") on April 2, 2003 alleging her removable as an alien present in the United States without being admitted or paroled pursuant to Immigration and Nationality Act ("INA") § 212(a)(6)(A)(i), 8 U.S.C. § 1182(a)(6)(A)(i). Petitioner applied for cancellation of removal ("COR") for certain non-permanent residents under Section 240A(b), 8 U.S.C § 1229b. (App. "C", *infra*, 7a.) The Immigration Judge ("IJ") found that Petitioner established both the continuous physical presence

and good moral character requirements. (App. "C", *infra*, 9a) In fact, the IJ found that she is a person of "high moral character" as one dedicated to the excellence of her children and the community. (App. "C", *infra*, 9a.)

However, the IJ denied Petitioner relief due to her alleged inability to meet the "exceptional and extremely unusual hardship" legal standard procured by the Board of Immigration Appeals ("BIA") in In Re Monreal, 23 I&N Dec 56 (BIA 2001) and Matter of Andazola, I&N Dec. 319 (BIA 2002) and the Ninth Circuit in Perez v. INS, 96 F.3d 390, 393 (9th Cir. 1996). (App. "C", *infra*, 13a) Petitioner timely appealed to the BIA who, on March 25, 2005, affirmed the decision of the Immigration Judge without opinion. (App. "B", *infra*, 4a-5a)

Petitioner then filed a petition for direct review with the Ninth Circuit Court of Appeals alleging: (1) existence of federal circuit jurisdiction based on the IJ's pure application of law to the factual determination, (2) the IJ's misapplication of the relevant legal standard to the undisputed facts of the case in the hardship determination deprived her of due process, and (3) the BIA's streamlining procedures violated Petitioner's right to due process under the Fifth Amendment of the Constitution of the United States. On July 31, 2006, that Court issued an order, in docket number 05-72303, dismissing the petition (App. "A", *infra*, 1a-3a) for lack of jurisdiction and failure to raise a colorable claim of due process, and further failure to raise a claim in accordance with its own precedent in Falcon Carriche v. Ashcroft, 350 F.3d 845 (9th Cir. 2003).

REASONS FOR GRANTING THE PETITION

I. IN THAT THE REAL ID ACT OF 2005 VESTED JURISDICTION EXCLUSIVELY WITH THE CIRCUIT COURTS OVER CLAIMS OF DUE PROCESS VIOLATIONS, CONFLICT INEVITABLY EXISTS BETWEEN SUCH STATUTE AND VARYING CIRCUIT PRECEDENT BELOW BECAUSE OF THE GENERAL NOTION THAT A PURE APPLICATION OF LAW TO FACTS CREATES A COLORABLE CLAIM TO DUE PROCESS.

One of the primary issues presented by the denial by the Ninth Circuit in the present case is whether a purported "misapplication of case law" can sufficiently raise a colorable due process claim. (App. "A", *infra,* 2a.) The Ninth Circuit determined that despite Petitioner's arguments that the IJ misapplied the relevant legal standards to the undisputed facts related to Petitioner's cancellation of removal application, the ultimate decision was discretionary and therefore was not subject to review. (App. "A", *infra*, 2a.) What is more, the Ninth Circuit relied on it's own precedent in finding that "misapplication of case law" can *never* sufficiently raise a colorable due process claim. (App. "A", *infra*, 2a [citing Sanchez-Cruz v. INS, 255 F.3d 775, 779 (9th Cir. 2001)].)

Notwithstanding the jurisdiction-stripping provisions for cases involving denials based on hardship determinations under 8 U.S.C. § 1229b(b), the Third Circuit Court of Appeals has determined "*issues of application of law to fact*, where the facts are *undisputed* and *not the subject of challenge*" *can* raise a colorable claim for due process sufficient for review per 8 U.S.C. § 1252(a)(2)(D). Kamara

v. AG of the United States[3], 420 F.3d 202, 211 (3d Cir. 2005) (citing Bakhtriger v. Elwood, 360 F.3d 414, 420 (3d Cir. 2004), Ogbudimkpa v. Ashcroft, 342 F.3d 207, 222 (3d Cir. 2003)). This is relevant and an essential reason for granting the instant petition when considering the legal standards an IJ uses in the hardship determination under U.S.C. § 1229b(b). For example, the IJ in the present case utilized three legal standards from various cases, In Re Monreal, 23 I&N Dec 56 (BIA 2001), Matter of Andazola, I&N Dec. 319 (BIA 2002) and Perez v. INS, 96 F.3d 390, 393 (9th Cir. 1996), and applied them to the undisputed facts related to the hardship determination. (App. "C", *infra*, 9a-12a.)

The IJ specifically found:

> [I]t is important to keep in mind that the *burden of proof* upon the respondent is *not* to demonstrate that her removal would result in a unconscionable level of hardship...See Matter of Monreal, supra...the Government correctly points out that there are *two possible scenarios* for this Court to consider in *evaluating* the type of hardship that would befall the three children...it would be improper to attribute hardship to parental choice...in this Court's view [Respondent must put forth] the evidence

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[3] Although the Third Circuit's analysis in Kamara technically was in the habeas corpus context under 28 U.S.C. § 2241, such analysis should apply in the non-habeas context as here because the REAL ID Act's transfer of all habeas petitions to the circuit courts. See REAL ID Act of 2005, 109 P.L. 13; 119 Stat. 231, Section 106(c).

> to show that it is a realistic opportunity [to leave the children behind].

(App. "C", *infra*, 10a-12a)(emphasis added.) Moreover, the IJ further evidenced his use of a pure legal standard by applying the law of Perez v. INS, 96 F.3d 390 (9th Cir. 1996) in relation to Petitioner's intent, or lack thereof, to leave her children behind. The IJ stated:

> In this Court's view, the Ninth Circuit....did clearly agree with the evidentiary standard showing respondent would have to come forth with the evidence to show that [leaving the children behind] is a realistic opportunity."

(App. "C", *infra*, 12a)(emphasis added.) In connection with this standard, the IJ concluded:

> [R]espondent has not carried her burden of proof to show that her removal from the United States would result in exceptional and extremely unusual hardship to any of the three children...[i]f the respondent were to leave the children behind, she has not carried *the evidentiary consideration* to show that it is a viable option to leave them behind...

(App. "C", *infra*, 13a-14a.)

In brief, it is reasonable to conclude the IJ was applying pure legal and evidentiary standards to the undisputed facts of Petitioner's application for cancellation of removal as related to the hardship determination. This is relevant to the current petition because the Third Circuit's holding in Kamara suggests an misapplication of law to undisputed facts *can*

constitute a colorable claim to a due process violation. As described above, a due process violation unquestionably vests the circuit courts of appeal with jurisdiction pursuant to 8 U.S.C. § 1252(a)(2)(D) . However, in this scenario, which is certainly plausible based on the foregoing reasoning, such would conflict with the jurisdictional bar under 8 U.S.C. § 1252(a)(2)(B). It should be further noted the Kamara holding suggests a precedent conflict with the Ninth Circuit's holding in Sanchez-Cruz v. INS, 255 F.3d 775, 779 (9th Cir. 2001) which determined that "misapplication of case law" may not be reviewed. These conflicts underscore the importance of granting the current petition.

A. *MATTER OF RECINAS* AS A FURTHER LEGAL STANDARD THE IMMIGRATION JUDGE IS REQUIRED TO ABIDE BY IN THE HARDSHIP DETERMINATION.

In the context of the IJ's denial, Petitioner contended the IJ failed to take another controlling legal and evidentiary standard from BIA precedent, namely Matter of Recinas, 23 I&N Dec. 467 (BIA 2002), into the hardship determination. In Recinas, the BIA emphasized the alien was a single mother who would have the heavy burden of providing the sole financial and familial support for her children if she was deported to Mexico. Matter of Recinas, 23 I&N Dec. 467, 470 (BIA 2002). The BIA premised the "exceptional and extremely unusual hardship" element as NOT needing to be "unconscionable." Id. The fact that the alien was the ***sole support*** for her children "increases the hardship the children would face upon a return to Mexico, as they would be completely dependent on their's mother ability, not only to find adequate employment and housing, but also to provide for their emotional needs." Matter of Recinas, 23 I&N Dec. 467 at 470.

In connection, the Board noted that the alien's children had difficulty speaking Spanish and could neither read nor write Spanish. Id. In addition, the fact that Recinas' USC children had spent their ***entire lives*** in the United States was extremely relevant because it demonstrated "they knew no other way of life." Matter of Recinas, 23 I&N Dec. 467 at 470. As the alien in Recinas had no "close relatives remaining in Mexico," the BIA found the hardship extolled on the family unit upon a forced return to Mexico would be extremely detrimental. Id. The reasoning was that "the respondent's ability to provide for the needs of her family will be severely hampered by the fact that she does not have any family in Mexico who can help." Id. Furthermore, the Board noted that the alien lacked the availability of an alternative means of immigrating to this country. Recinas, 23 I&N at 470-72. The BIA held that "these critical factors *distinguish* her case." Id. (emphasis added).

B. THE IJ'S MISAPPLICATION OF *MATTER OF RECINAS* TO THE UNDISPUTED FACTS OF PETITIONER'S CASE WHICH GIVES RISE TO A COLORABLE CLAIM TO DUE PROCESS.

Unlike the children in Monreal and identical to the children in Recinas based on the undisputed facts of the case, Petitioner's children in the instant case, are for the most part, dependent on Petitioner financially and emotionally as she is the driving force behind her children's highest-level achievements in school and society as conceded by the IJ. (App. "C", *infra*, 9a.) The IJ specifically stated that Petitioner "is truly motivated by a desire to bring out the very best in her three children." Id. Petitioner's oldest son, Jose, maintains a 4.0 GPA, excels in karate, and is involved with after-school activities such as the orchestra. CAR at 44. The IJ even noted "the record is replete with certificates that he

has received as a result of his outstanding educational achievements." Id.

In addition, he is in a program termed "GATE" which is a special program for academic excellence which fosters further success in life. (App. "C", *infra*, 13a.) The base his mother has provided has motivated him to further excel in life as an architect as the IJ stated "his educational drive and desire to achieve success is received to him from the emphasis that his mother has placed on his education." (App. "C", *infra*, 13a.)

The younger boys are following their mother's molding of Jose and exhibiting every sign of the same excellence as their brother. (App. "C", *infra*, 13a) Their mother volunteers three hours per day and fifteen hours per week in support of her children at their school. Id. This is important as it shows the support the children rely on in that her mother's connection to their school is quite intricate.

More importantly, the two oldest sons, ages 16 and 14, are in high school. These facts are extremely relevant in meeting the evidentiary hardship legal standard because it is at this age which lays the foundation for the rest of their lives in terms of direction. What this means is this is a time when the children make future decisions where to seek higher education. Ripping them from this critical juncture would significantly reduce their chances of attaining higher education they have worked so hard to achieve thus far. In addition, is it highly unlikely Petitioner would be able to be involved physically in her children's school as she does in the United States. It is inconceivable to even expect they would return to this high level of success upon a forced acclimation to a foreign culture with admittedly lower standards.

Assuming arguendo, Petitioner does take her children with her, as in Recinas, Petitioner's USC children would be completely dependent on their parent's ability, not only to find adequate employment and housing, but also to provide for their emotional needs, and as such, the level of hardship is raised. See Matter of Recinas, 23 I&N Dec. 467 (BIA 2002). Petitioner's younger son testified that he was deathly afraid of his mother's inability to find suitable living arrangements upon their forced return to Mexico. (App. "C", *infra*, 13a.)

Furthermore, Petitioner's USC children read and speak English as a primary language, and cannot read or write in the Spanish language proficiently and have only a limited Spanish speaking capability. Petitioner testified that "they've never been in a Spanish class." Petitioner's oldest son testified that English is his best language. The Government's questioning even revealed the children have never received a bilingual education. Also, her children speak to her in English. The IJ even conceded this point in that "none of them is versed in the written Spanish language." (App. "C", *infra*, 15a.) Most importantly, as identical to the children in Recinas, Petitioner's children have spent "all their lives here" and therefore, under the logic of the aforementioned decision, would "know no other way of life." Matter of Recinas, 23 I&N Dec. 467 (BIA 2002). In addition, Petitioner has no immediate "availability of an alternative means of immigrating to this country." Recinas, 23 I&N at 470-72. As such, in accordance with Recinas, "these critical factors *distinguish* her case." (emphasis added) Id.

Therefore, per the "cumulative analysis" of hardship factors in Recinas, the heavy financial and familial burden on Petitioner, the lack of availability of familial financial support in Mexico, the USC children's unfamiliarity with the Spanish

language, and the lack of available alternate methods of immigrating is well beyond the hardship that "is normally experienced in most cases of removal." Matter of Recinas, 23 I&N Dec. 467 (BIA 2002). This is relevant to the conflict cited above because Petitioner's presentation of this argument lays a proper foundation for whether the IJ misapplied the relevant *legal and evidentiary* standards in the hardship determination. According to the logic of the Kamara case from the Third Circuit , Petitioner could ultimately present a meritorious due process violation for misapplication of law to the undisputed facts of the case. As such, the holding below illustrates the statutory and precedent conflict described above while further suggesting such decision was wrongly decided.

II. THE DIFFERING STANDARDS FOR HARMLESS ERROR AMONG THE CIRCUITS CAUSE FEDERAL REVIEW OF THE BIA'S STREAMLINING REGULATIONS TO BE INCONSISTENT ULTIMATELY LEADING TO UNEQUAL TREATMENT FOR ALIENS DEPENDING ON GEOGRAPHICAL LOCATION.

The BIA's streamlining regulation, otherwise known as affirmance without opinion ("AWO"), is a three-sentence decision by a single Board Member that affirms, without any explanation, the results of the decision reached by an IJ in a case. See 8 C.F.R. § 3.1(e)(4) (September 25, 2002). An AWO decision indicates that the Board member agrees with the result reached by the IJ, but does not necessarily indicate agreement with the IJ's reasons for reaching that result. See 8 C.F.R. § 3.1(e)(4)(ii). A Board member is authorized to use the AWO procedure only if the case satisfies the requirements for such a decision which are set out in the regulations. See 8 C.F.R. § 3.1(e)(4)(i).

For the AWO procedure to be used, the regulations require the Board Member to first review the merits of the case to ensure that the result reached by the IJ was correct. The Board Member must also make sure that the case satisfies several other criteria, discussed below, before using the summary AWO procedure. If a case does not satisfy all of the required criteria, then the single Board Member has the authority to issue a brief order affirming, modifying, or remanding the case. 8 C.F.R. § 3.1(e)(5). Unlike AWO decisions, these brief orders will contain at least some explanation for the decision. In very limited circumstances, the case will be reassigned to a three-Member panel of the Board. Id.; 8 C.F.R. § 3.1(e)(6). Three-Member panels of the Board will truly become the exception, rather than the predominant method for deciding cases.

The regulations are clear that an AWO is an affirmance of the results of the IJ's decision but not necessarily an affirmance of the IJ's reasons for his or her decision. Despite the fact that the Board Member may disagree with the IJ's reasons for the decision, the Board Member is *prohibited* by the regulation from explaining his or her own reasons. Instead, the AWO decision issued by the Board Member must contain only the following three sentences: "The Board affirms, without opinion, the result of the decision below. The decision below is, therefore, the final agency determination." 8 CFR 3.1(e)(4).

Before affirming an IJ's decision without opinion, the Board Member must determine that the case satisfies the criteria for an AWO decision set forth in 8 C.F.R. § 3.1(e)(4)(i). Specifically, the case must satisfy both of the requirements listed in sections (a) and (b) below, and one of the two alternate requirements listed in section (c):

> a. the result reached by the IJ must be correct; and
> b. any errors in the decision below must be *harmless or nonmaterial* (emphasis added); and either
> c. (i) the issues on appeal must be squarely controlled by existing Board or federal court precedent and cannot involve the application of precedent to a novel fact situation; or
> (ii) the factual and legal issues raised on appeal must be "not so substantial that the case warrants the issuance of a written opinion in the case."

As indicated above, determining "harmless error" is essential to the BIA's use of the AWO procedure. Unfortunately, the standard for harmless error varies somewhat in different federal circuits. See Agyeman v. INS, 296 F.3d 871 (9th Cir. 2002) (finding prejudice where IJ failed to adequately explain procedures and develop the record); Podio v. INS, 153 F.3d 506 (7th Cir. 1998) (finding IJ's refusal to allow witnesses to testify was prejudicial); Perez-Lastor v. INS, 208 F.3d 773 (9th Cir. 2000) (finding alien prejudiced by his inability to understand the translator); Colemenar v. INS, 210 F.3d 967 (9th Cir. 2000) (finding prejudice where petitioner was "so clearly denied a full and fair hearing"). Moreover, several errors - each of which alone might be harmless - can have a combined effect that is prejudicial. See, e.g., Vargas-Garcia v. INS, 287 F.3d 882, 886 (9th Cir. 2002) (combination of several errors deprived petitioner of due process).

Therefore, as the definition of "harmless error" varies across the judicial circuits, there is room for disparate treatment of aliens geographically in respect to when the BIA

is to use the AWO procedures depending on the circuit the case originates. More importantly, such disparate treatment in the application of immigration laws is in direct conflict with Congress' intended mission in creation of the BIA which "is to provide fair and timely immigration adjudications and authoritative guidance and *uniformity in the interpretation of the immigration laws*." Casas-Chavez v. INS, 300 F.3d 1088, 1092 (9th Cir., 2002)(quoting 64 FR 56135-01, 56136 [1999])(emphasis added). The Second Circuit has supported this contention in holding that the *interests of uniformity in interpretation of immigration law* should outweigh the interests of a circuit's precedence. See Sutherland v. Reno, 228 F.3d 171, 174 (2d Cir. 2000)(emphasis added). This apparent conflict merits a proper review before this Court.

A THE QUESTION PRESENTED HERE IS EQUALLY IMPORTANT.

i. THE VARIOUS CIRCUITS HAVE CONSISTENTLY HELD THAT AN ALIEN IS ENTITLED TO A REASONED DECISION BY THE BIA.

This Court has specifically held that an agency, such as the BIA, is required to explain the reasons behind a decision. SEC v. Chenery Corp., 332 U.S. 194, 196-97 (1946) (calling the requirement a "fundamental rule of administrative law") see also Guentchev v. INS, 77 F.3d 1036, 1038 (7th Cir. 1996) (a statement of reasons for a decision is a "norm of administrative law"). In the Federal Register announcement of the current AWO regulation, the DOJ acknowledged that appellants in removal proceedings have a "right to a reasoned administrative decision." Executive Office of Immigration Review; Board of Immigration Appeals: Streamlining, 64 FR 56135, 56137(1999).

Federal courts have routinely required the Board to provide an explanation for a decision that is sufficient to allow the court to carry out a review. See, e.g., Panrit v. INS, 19 F.3d 544, 546 (10th Cir. 1994)(quoting Turri v. INS, 997 F.2d 1306, 1310 (10th Cir. 1993) [noting that Board has an obligation to "articulate a reasoned basis for its decision"]); Mousa v. INS, 223 F.3d 423, 430 (7th Cir. 2000) (Board must consider all claims and "give careful, individualized, rational explanations for its decisions"); Guentchev v. INS, 77 F.3d at 1038 (citation omitted) (Board "must announce its decision in terms sufficient to enable a court to determine it heard and thought and not merely reacted"); Paramasamy v. Ashcroft, 295 F.3d 1047 (9th Cir. 2002) (Board must provide a 'comprehensible reason for its decisions sufficient for [the court] to conduct [its] review and to be assured that the petitioner's case received individualized attention"); Vargas v. INS, 938 F.2d 358, 363 (2nd Cir. 1991) (citations omitted) ("Board's decision stands or falls on its express findings and reasoning"); Tukhowinich v. INS, 64 F.3d 460, 464 (9th Cir. 1995) (citations omitted) (setting aside a Board decision which failed to support its conclusion with a reasoned explanation based on legitimate concerns).

The Ninth Circuit, where this case originated, has specifically held "we do not allow the Board to rely on 'boilerplate' opinions 'which set out general legal standards yet are devoid of statements that evidence an individualized review of the petitioner's circumstances.'" Ghaly v. INS, 58 F.3d 1425, 1430 (9th Cir. 1995). The Ninth Circuit continued in that the "BIA's decision must contain a statement of reasons for denying petitioner relief adequate for us to conduct our review." Id.

As discussed above, the three sentence AWO decision does not contain any reasons or explanation as to why the

decision was reached. To complicate matter, such a decision fails to even reach the "boilerplate" decision the Ninth Circuit clearly frowns upon. See Ghaly v. INS, supra. The BIA's AWO therefore procedure stands in direct conflict to the various circuits' holding that an alien, at minimum, is entitled to a cogent and decipherable decision by the BIA. This clear conflict stresses the importance for review before this court.

ii. THE AWO PROCEDURE IS FUNDAMENTALLY FLAWED AND DEPRIVES AN ALIEN OF ADEQUATE REVIEW IN THE AGENCY SPECIFICALLY CREATED BY CONGRESS FOR ADJUDICATION OF HIS OR HER IMMIGRATION CASE.

Many of the circuit courts which have ruled on the AWO procedure have taken great effort to comment on such procedure's fallible nature. The First Circuit Court of Appeals expressed concern that a Board member can use the AWO procedure without having to explain why a case meets the AWO requirements. See Albathani v. INS, 318 F.3d 378,379 (1st Cir., 2003). As a result, a court may not be able to tell whether the Board member fully reviewed the case and correctly applied the regulation. Albathani v. INS, 318 F.3d 378,379 (1st Cir., 2003). The Court also recognized that this was not an abstract concern in light of the huge caseload faced by the Board. Id. The Court indicated it would likely consider the issue differently if there was evidence of misapplication of the AWO procedure by the Board, particularly evidence of systemic misuse of the procedure. Id. at 377.

Recently, the Fifth Circuit Court of Appeals has echoed the general concern regarding the flaws in the AWO

procedure. In Yuqing Zhu v. Ashcroft, 382 F.3d 521 (5th Cir., 2004), the Second Circuit vacated the BIA's use of AWO because court did not know if the BIA affirmed on a non-reviewable basis, i.e., untimeliness, or a reviewable basis, i.e., the merits of the asylum claim.

These concerns are clearly valid and discernable in practice when considering the amount of cases in which the AWO procedure is utilized. According to an investigation by the Los Angeles Times, 57% of the cases decided by the Board in October 2002 were affirmed without opinion. In total, individual Board members summarily affirmed 16,275 cases between March 1, 2002 and September 24, 2002. This increase in AWO decisions corresponds with an increase in denials; in October 2002, for example, the Board rejected 86% of its appeals, compared with 59% the previous October. See L. Getter and J. Peterson, Speedier Rate of Deportation Rulings Assailed, Los Angeles Times, January 5, 2003, at A-1.

In addition, the American Immigration Law Foundation has taken an informal study which indicates:

> that half of the decisions issued by the Board were AWO decision; this means that there may have been over 100 AWO decisions on any given day...under the new regulations, an even larger number of AWO decisions is likely, because the AWO process - which was discretionary - is now mandatory for all cases that satisfy the cirteria..Because Board Members are churning out such a high volume of these decisions, it is difficult to believe that they are carefully reviewing every appeal to ensure that it meets all of the requirements for

an AWO decision[4]. See Kenney, Mary, How To Challenge An Affirmance Without Opinion By A BIA Member, <http://www.ailf.org/lac/lac_pa_100102.asp>, September 27, 2002 at 2.

These statistics clearly illustrate the sheer number of AWO cases and further reveal the likely possibility of gross and flagrant error put forth by the circuit courts as discussed above further stressing the importance of review in the instant case.

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[4] For example, in Farjardo v.INS, 2002 U.S. Lexis 16045 (9th Cir. Aug. 9, 2002), the court reversed and remanded an AWO decision after finding that the underlying decision by the IJ was based upon two "clear"-and prejudicial - errors of law. AWO should never have been used in that case, since one of the requirements is that any errors by the IJ be harmless ones. Similarly, in the precedent case Matter of Ramos, 23 I. & N. Dec. 336 (BIA 2002), a single Board Member originally - and erroneously - used the AWO procedure to affirm the IJ's determination that a felony DWI under Massachusetts's law was an aggravated felony. On reconsideration, the Board, en banc, used this case to overrule its earlier precedent on DWI convictions. A precedent-setting case by definition cannot satisfy the criteria for AWO and the single Member clearly erred in using this procedure initially. Unfortunately, most erroneous AWO decisions will not be overturned on reconsideration.

iii. EVEN THE GOVERNMENT, WHO ADVOCATED USED OF THE AWO PROCEDURE IN THE INSTANT CASE, HAS BEEN FORCED TO REALIZE THE PROCEDURE'S INVALID NATURE.

The government has moved to remand some federal court appeals for new Board decisions specifically because the Board erred in using the AWO procedure in the case. See, e.g., Paz v. Bulger, No. 02-22024 (S.D. Fla. Dec. 5, 2002) (because the Board had erroneously used the AWO procedure, government requested remand so that a three-member panel of the Board could decide the appeal); Tapia-Rodriguez v. Ashcroft, No. 02-60660, motion to dismiss filed, (5th Cir. Feb. 5, 2003) (government moved to dismiss court appeal after Board sua sponte reopened case – upon government's request – because it had erred in using the AWO procedure); Sylla v. INS, No. 02-2915/03-1348 (3d Cir. Feb. 10, 2002) (government moved to remand case to the Board after petitioner and AILF challenged the AWO procedure).

Therefore, the Government has repeatedly questioned the validity of the very same procedure it advocates for in the instant case. At minimum, such conflict demonstrates the critical nature importance of this issue thus deserving of this Court's review.

iv. INVALIDATION OF THE AWO PROCEDURE AND REQUIREMENT OF THE BIA TO PUT FORTH A REASONED OPINION WOULD ALLEVIATE THE HEAVY CASE LOAD IN THE JUDICIAL CIRCUITS.

It is common knowledge for any practitioner in the federal court system that the federal courts are severely overworked based on an apparent inundation of petitioner for direct review filed by immigrants. (App. "D", *infra*, 29a-31a.) In that this inundation of new cases in the federal judiciary coincides with the AWO procedures' implementation is no coincidence. (App. "D", *infra*, 29a-31a.) Forcing the BIA to put forth reasoned opinions would clearly lessen the already-heavy burden on the federal courts and increase judicial economy. Moreover, this sheer number of new filings demonstrates the burden the AWO procedures are placing on the federal courts in abdication of the BIA's statutory duties and in deprivation of an alien's Fifth Amendment right to due process.

CONCLUSION

Based on the foregoing, the petition for a writ of certiorari should be granted.

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